

PETER N. LAMBERTO, State Bar No. 061813
LAMBERTO & KREGER
160 West Santa Clara, Suite 1050
San Jose, CA 95113-2311
Telephone: (408) 999-0300
Facsimile: (408) 999-0301

Attorneys for Plaintiff LISAMARIE BRAYDEN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LISAMARIE BRAYDEN

Case No. C 07-04910 JF

Plaintiff,

vs.

PSC INDUSTRIAL OUTSOURCING, INC.,
MARK BLANCHARD, JOE HAMBY, BRUCE
ROBINSON, AND DOES 1-50 AND DOES 1-50,

Defendants.

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO
REMAND (28 U.S.C. §1447 [c])**

Date: December 14, 2007
Time: 9:00 a.m.
Dept.: 3; Hon. Jeremy Fogel

Plaintiff is a resident of California. Defendants' removed this matter from the Monterey County Superior Court to this court on the ground that there was complete diversity among the parties, stating that the only California resident among the defendants, Joe Hamby, was improperly joined as a defendant, because he could not be liable under plaintiff's stated causes of action for wrongful (retaliatory) termination or for sexual harassment.

This authority for this motion is based on 28 U.S.C. §1447 [c], which indicates that a remand lies where there is no diversity of citizenship. We need only address the issue of Hamby's potential liability for the wrongful retaliatory constructive termination of plaintiff's employment with defendant PSC Industrial Outsourcing, Inc., as set forth in the first cause of action of the complaint, to dispose of defendants' argument for diversity.

As explained below, and contrary to the assertion in the removal papers, any person, including site managers such as Joe Hamby, can be liable for retaliatory wrongful termination, under CA Gov. Code § 12940 (h). Defendants' argument that a retaliatory termination, because

1 it is a “wrongful termination,” does not allow for individual liability, is contrary to State of
2 California, and 9th Circuit, case authority.

3 The complaint in this matter, attached as Ex. A to Sharon Rossi’s declaration in support of
4 Defendants’ Removal papers, is entitled “COMPLAINT FOR WRONGFUL RETALIATORY
5 TERMINATION, AND FOR SEXUAL HARASSMENT.” The complaint alleges that
6 Defendants, *and each of them*, retaliated against plaintiff for complaining of sexual harassment
7 against defendant Blanchard, by demoting her and requiring her to work with potentially toxic
8 chemicals on what they called “yard duty,” forcing her to leave the job for fear for her own well
9 being, health, and safety. A more detailed account of plaintiff’s allegations can be found in
10 paragraphs 6-11 of her complaint (pages 2-3 thereof).

11 Defendants’ argument that an individual cannot be held liable for “wrongful termination”
12 appears to ignore the words “retaliation” and “retaliatory,” found throughout the first cause of
13 action. A retaliatory wrongful termination (constructive or otherwise), through the subjecting of
14 an individual to intolerable and dangerous working conditions because the individual had
15 complained of gross sexual harassment by her immediate supervisor, Mark Blanchard, is
16 actionable retaliation against any individual person who perpetrated the retaliatory conduct. This
17 is the consistent holding of both California appellate courts interpreting FEHA (*Walrath v.*
18 *Sprinkle* (2002) 99 C.A.4th 1237, 1241), as well as the 9th Circuit view, as set forth in *Wintaro v.*
19 *Toshiba* (2001) 274 Fed.Rptr. 3d 1276, the latter of which states:

20 “The retaliation provision of the FEHA applies to ‘any employer...or person’ Cal. Gov’t
21 Code § 12940(h) (emphasis added [by 9th Cir.]). ‘Person’ in this section means, in part, ‘one or
22 more individuals.’ Cal. Gov’t Code § 12925(d). Giving these words their ordinary meaning, we
23 conclude that the plain meaning of the statute is susceptible to only one interpretation: supervisors
24 can be held liable for retaliation under section 12940(h) of the California Government Code.” *Id.*,
25 at 1288.

26 Defendants in their moving papers admit that Hamby, the site manager, is a resident of
27 California. Therefore, we need not address the spurious claim that Mark Blanchard, a convicted
28 sex offender in Louisiana who moved to California and registered with the authorities in

1 California as a sex offender, is really a resident of Louisiana, though that may be where he is
2 currently hiding.

3 For these reasons, we need not address whether Mr. Hamby can be liable for the sexual
4 harassment claim of the second cause of action, as the resolution of the status of Hamby as to the
5 first cause of action resolves the question of the presence or absence of diversity jurisdiction. *Any*
6 *individual*, including site managers such as Mr. Hamby who participated in retaliatory acts against
7 an individual because that individual complained of being assaulted by a convicted sex offender,
8 has personal liability for their retaliatory conduct. Therefore, Mr. Hamby is a proper defendant
9 herein, and his presence defeats the basis for the removal, which was purported diversity.

10 Based on the foregoing, it is respectfully requested that this court remand the matter to the
11 Monterey County Superior Court for further proceedings.

12 Dated: October 12, 2007

LAMBERTO & KREGER

13
14 By: _____
15 PETER N. LAMBERTO
16 Attorneys for Plaintiff
17
18
19
20
21
22
23
24
25
26
27
28